

Mailed:

**THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT OF
THE TTAB**

December 14, 2005
GDH/gdh

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Ram International I, LLC

Serial No. 76541379

Mark J. Nielsen and Cynthia L. Doll of Law Office of Mark J. Nielsen for Ram International I, LLC.

Amy E. Hella, Trademark Examining Attorney, Law Office 110 (Chris A. F. Pedersen, Managing Attorney).

Before Hohein, Chapman and Grendel, Administrative Trademark Judges.

Opinion by Hohein, Administrative Trademark Judge:

Ram International I, LLC has filed an application to register on the Principal Register the mark shown below



for "restaurant services; [and] bar services" in International Class 43.¹

¹ Ser. No. 76541379, filed on August 18, 2003, which is based on an allegation of a date of first use anywhere and in commerce of December 31, 1971.

Registration has been finally refused under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the ground that applicant's mark, when applied to its services, so resembles the mark "RAMS HEAD," which is registered on the Principal Register in standard character form for "restaurant, tavern" services in International Class 43,² as to be likely to cause confusion, or to cause mistake, or to deceive.

Applicant has appealed. Briefs have been filed, but an oral hearing was not requested. We affirm the refusal to register.

Our determination under Section 2(d) is based on an analysis of all of the facts in evidence which are relevant to the factors bearing on the issue of whether there is a likelihood of confusion. In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563, 568 (CCPA 1973). However, as indicated in Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976), in any likelihood of confusion analysis, two key considerations are the similarity or dissimilarity in the goods or services at issue and the similarity or dissimilarity of the respective marks in their entireties.³ Here, inasmuch as applicant's restaurant and bar services are, for purposes of analysis, legally identical to

² Reg. No. 2,794,001, issued on December 16, 2003, which sets forth a date of first use anywhere and in commerce of December 15, 1987.

³ The court, in particular, pointed out that: "The fundamental inquiry mandated by §2(d) goes to the cumulative effect of differences in the essential characteristics of the goods [or services] and differences in the marks." 192 USPQ at 29.

registrant's restaurant and tavern services, and therefore would be rendered to the same classes of ordinary consumers (e.g., members of the general public in the case of restaurant services and those of legal drinking age in the case of bar or tavern services),⁴ the primary focus of our inquiry is on the similarities and dissimilarities in the respective marks when considered in their entirety.

Turning, therefore, to consideration of the marks at issue, we note as a preliminary matter that, "[w]hen marks would appear on virtually identical goods or services, the degree of similarity [of the marks] necessary to support a conclusion of likely confusion declines." *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992), *cert. denied*, 506 U.S. 1034 (1994). See also *ECI Division of E-Systems, Inc. v. Environmental Communications Inc.*, 207 USPQ 443, 449 (TTAB 1980). Moreover, as stated in TMEP Section 1207.01(c)(i) (4th ed. 2005):

Under the doctrine of legal equivalents, a pictorial representation and its literal equivalent may be found to be confusingly similar. This doctrine is based on a recognition that a pictorial depiction and equivalent wording are likely to impress the same mental image on purchasers. *See, e.g., In re Rolf Nilsson AB*, 230 USPQ 141 (TTAB 1986) (design comprising the silhouette of the head of a lion and the letter "L" for shoes held likely to be confused with LION for shoes); *Puma-Sportschuhfabriken Rudolf Dassler KG v. Garan, Inc.*, 224 USPQ 1064 (TTAB 1984) (designs of mountain lion, for shirts and tops, held confusingly similar to PUMA, for items of clothing; the design of a

⁴ Applicant, we note, does not contend otherwise in either its initial or reply briefs.

puma, for items of sporting goods and clothing; and PUMA and design, for T-shirts); *In re Duofold Inc.*, 184 USPQ 638 (TTAB 1974) (design of eagle lined for the color gold, for various items of sports apparel, held likely to be confused with GOLDEN EAGLE and design of an eagle, for various items of clothing).

Applicant nonetheless contends, in its initial brief, that:

First, the express language of the [quoted section of the] TMEP recognizes that a design mark may be found to be confusingly similar but such a finding is not mandatory. The doctrine of legal equivalents should be invoked only when circumstances show that confusion is likely, not when a finding of legal equivalence is supported only by a semantic syllogism. Here, both Applicant and the owner of the cited mark own registrations for RAM-formative marks for restaurant and bar services. Under such circumstances, a finding of likelihood of confusion should have a particularly substantial basis.

Second, the decisions cited in the TMEP and relied on by the Examining Attorney ... do not involve situations where the applicant also owned registrations featuring the name of the animal shown in the design mark.

Specifically, applicant notes that it is the owner of subsisting registrations on the Principal Register for both the mark "RAM RESTAURANT & BREWERY" and design, as depicted below,⁵



⁵ Reg. No. 2,906,626, issued on November 20, 2004, which sets forth a date of first use anywhere and in commerce of September 30, 2000. The terms "RESTAURANT & BREWERY" are disclaimed. The mark, which is described as consisting of the "of the words RAM RESTAURANT & BREWERY in stylized lettering," includes a claim to the color gold in the word "RAM" as a feature of the mark.

and the mark "RAM RESTAURANTS BIG HORN BREWERIES" and design, as illustrated below,⁶



which pertain, in each instance, to "restaurants; bar services." Applicant also points out that the owner of the cited mark owns a registration for the mark "RAMS HEAD WHERE GREAT MINDS MEET" and design, as reproduced below,⁷



for "restaurant, tavern" services, "which includes a pictorial representation of two rams showing their horns, head, chest and front legs."

Referring, in addition, to copies of various third-party registrations which it asserts "were submitted for the sole purpose of demonstrating that graphic representations of male bighorn sheep prominently feature a ram's distinctive cured horns," applicant stresses that:

⁶ Reg. No. 2,802,831, issued on January 6, 2004, which sets forth a date of first use anywhere and in commerce of April 30, 2001. The words "RESTAURANTS" and "BREWERIES" are disclaimed.

⁷ Reg. No. 2,918,363, issued on January 18, 2005, which sets forth a date of first use anywhere and in commerce of December 15, 1987. The description of the mark states that the lining is a feature of the mark and does not indicate color, while the stippling is for shading purposes only and does not indicate color.

The distinctive feature of a ram, the male bighorn sheep, is a curved horn on either side of its head. There are no other distinctive aspects of this animal's coloring, shape or size. A ram's head is not, per se, its distinctive feature; only the curved horns are the distinctive feature of a ram. Accordingly, a ram's head is often, but not always, included in graphic depictions of rams, but the head is incidental to the curved horns. This is confirmed by the fact that while graphic depictions of a ram may show only the curved horns without the head, a ram's head is never shown without the horns. Similarly, graphic depictions of rams always include the curved horns but never focus on the head, per se, because it is not an identifying feature of male bighorn sheep; graphic depictions of rams always show the horns and may not include the head at all, or may include only the head, or the head and neck, or the head, neck and front legs, or the entire body.

Based upon all of the foregoing, applicant maintains that:

The doctrine of legal equivalents, which is not mandatory in any circumstances, must be applied much more deferentially, if at all, when the owner of the design mark in question also owns registrations featuring the legal equivalent of the subject matter of the design. If the Patent and Trademark Office has seen fit to issue registrations to different entities for marks featuring the same words for the same or closely related services, then the doctrine of legal equivalents should either not apply at all or should be applied very narrowly to one registrant's design mark only when unusual circumstances warrant application of the doctrine.

Applicant, in particular, argues that in this instance, "the Examining Attorney has not correctly analyzed the facts pertinent to this application and that the refusal to register should be reversed. Here, applicant insists, the Examining Attorney is in error in asserting that the "plain meaning" of the

cited mark "is that it refers to the head of a ram," arguing that such mark has no definite meaning:

Applicant recognizes that we live in an age in which punctuation is often informal if not incorrect, but Applicant believes the Examining Attorney has reached too far in saying that the cited mark has a plain meaning at all and in saying that the plain meaning of RAMS HEAD is the same as the plain meaning of "a ram's head" and "a ram head."

Applicant contends that the cited mark is a syntactic anomaly, being the conjunction of a plural noun and a singular noun with no obvious or certain meaning. For example, ... "Rams Head" could refer to a geographic place such as a headland known as "Rams Head." Any other meaning assigned to "Rams Head" would be contrary to conventional rules of grammar and punctuation. As a result, the literal meaning of "Rams Head" is uncertain, and this expression leaves it up to the viewer to settle upon a specific meaning.

Applicant further insists, in consequence thereof,

that:

In interpreting the meaning of RAMS HEAD, it is particularly useful to refer to the design mark belonging to the owner of the cited mark, namely Registration No. 2,918,363 for RAMS HEAD WHERE GREAT MINDS MEET. The graphics in this mark show that the owner of the cited mark does not think the plain meaning of RAMS HEAD is the head of a ram. The design mark shows two drawings of male bighorn sheep (prominently featuring curved horns, of course, that are disproportionately large) showing their front legs, shoulders, heads and horns. If the plain meaning of RAMS HEAD is the head of a ram, one might expect the owner of the mark to recognize the plain meaning of its own mark and use graphics that show only or primarily the head of one ram. But that is not the case. The design mark suggests that RAMS is indeed a plural noun and that whatever the RAMS HEAD mark as a whole means, it does not mean the head of one ram.

Applicant acknowledges that one of several possible meanings that might be ascribed to RAMS HEAD is "the head of a ram," but this is not the only or the most obvious meaning of RAMS HEAD. This point is important here because if the literal meaning of RAMS HEAD is not clear or certain, this should have a significant impact on the application of the doctrine of legal equivalents. How can Applicant's design be confusingly similar to the literal equivalent of RAMS HEAD when RAMS HEAD does not have a clear, literal equivalent and several different meanings might be ascribed to this mark?

In the alternative, however, applicant contends that "[e]ven if ... the cited mark had a literal meaning and that literal meaning was 'the head of a ram,' the doctrine of legal equivalents should not be applied here" because applicant's mark is, assertedly, "not a pictorial representation of the head of a ram" but rather would be regarded as simply signifying a depiction of a ram. Specifically, applicant argues that:

As noted above, curved horns are the sole distinguishing characteristic of male bighorn sheep. Depictions of rams always feature the curved horns because those are the features that signal to consumers that the animal being depicted is a male bighorn sheep or ram. Whether the head is shown at all, or whether the head, neck and chest are shown, or (as in the drawing [of the other mark] registered by the owner of the cited mark) the head, neck, chest and front legs are shown is irrelevant to the meaning of the drawing. The curved horns are the single essential element in a depiction of a ram. The other elements are a matter of indifference for the meaning of the drawing; the other elements are a matter of aesthetic sensibility, which will vary with the style and purpose of each illustration. The [applicant's] subject mark happens to be a simple, stylized line drawing of the curved horn, head and neck of a ram, but it is the curved horn that identifies the subject of the drawing as a ram. For over 30 years, the

subject mark has been viewed by consumers as a ram, which is the graphic equivalent of the dominant element of applicant's [two] registrations. The meaning of the subject mark is simply "ram," not "the horn of a ram," or "the neck of a ram," or "the head of a ram." The subject mark is not likely to be viewed as "the head of a ram" and is unlikely to ever be confused with the RAMS HEAD mark.

Moreover, as to the cited "RAMS HEAD" mark, applicant again asserts its contention that such mark "does not have a clear, literal meaning," arguing that "[f]ew consumers would view the subject mark to mean "the head of a ram," as the Examining Attorney maintains, because such a meaning "is one of several possible meanings that might be ascribed to this syntactic anomaly." Applicant reiterates its contention that, [j]udging from Registration No. 2,918,363, ... the owner of the cited mark does not agree with the Examining Attorney that the [cited] mark means the head of one ram." Rather, as previously noted, applicant urges that "[t]he owner of the cited mark associates its RAMS HEAD mark with a drawing of two rams featuring the curved horns and the front half of the rams' bodies, not with a depiction of a head of a ram." Applicant thus concludes that, "[i]n the absence of a clear, literal meaning, there is no certain comparison point between the cited mark and pictorial representation of the [mark which is the subject of the] application under consideration." Given such uncertainty, applicant insists that "there can be no basis for concluding that confusion is likely between RAMS HEAD and the subject mark."

We agree, however, with the Examining Attorney that confusion is likely. Among other things, we concur with the

Examining Attorney that, as stated in her brief, we "need not decide if there should be an exception to the doctrine of literal [or legal] equivalents based on the ownership of previous registrations where the [marks which are the subjects of the] previous registrations are the literal [or legal] equivalent of the [applicant's] subject mark." Aside from the odd contention that, basically, the doctrine of legal equivalents should be used so as not to apply the doctrine of legal equivalents, we note that in this case neither of applicant's prior registrations--which each issued subsequently to the cited registration--are for, in essence, the mark "RAM" per se.⁸ Rather, one of such registrations is for the stylized mark "RAM RESTAURANT & BREWERY" and design, which does not merely include the generic terminology "RESTAURANT & BREWERY" but also prominently displays the word "RAM" in the color gold as a claimed feature of the mark, while the other registration is for the mark "RAM RESTAURANTS BIGHORN BREWERIES" and design, which similarly contains not just the generic terms "RESTAURANTS" and "BREWERIES" but also displays the word "BIGHORN" along with other integral design features. Neither of such marks, therefore, is the legal equivalent of the design mark which applicant presently seeks to register.

Moreover, a more fundamental reason for not adopting the approach advocated by applicant is that, insofar as the

⁸ As set forth in, for example, *Van Dyne-Crotty Inc. v. Wear-Guard Corp.*, 926 F.2d 1156, 17 USPQ2d 1866, 1868 (Fed. Cir. 1991), for a mark to be the legal equivalent of another mark, "the consumer should consider both as the same mark." Thus, as further explained therein, legally equivalent marks must create the same, continuing commercial impression and each mark should not materially differ from or alter the character of the other mark.

registrability of applicant's mark is concerned, it is settled that the issue of likelihood of confusion must be determined solely on the basis of such mark and registrant's mark as they are respectively set forth in the application and cited registration. This is because Section 2(d) of the Trademark Act precludes registration of "a mark which so resembles a mark registered in the Patent and Trademark Office ... as to be likely ... to cause confusion" Thus, the fact that applicant owns two registrations for marks which include the word "RAM," as well as the fact that the owner of the cited mark owns a registration which includes the depiction of two rams, are irrelevant and immaterial to the issue of likelihood of confusion.⁹ See, e.g., Sealy, Inc. v. Simmons Co., 265 F.2d 934, 121 USPQ 456, 459 (CCPA 1959); Burton-Dixie Corp. v. Restonic Corp., 234 F.2d 668, 110 USPQ 272, 273-74 (CCPA 1956); Hat Corp. of America v. John B. Stetson Co., 223 F.2d 485, 106 USPQ 200, 203 (CCPA 1955); and ITT Canteen Corp. v. Haven Homes Inc., 174 USPQ 539, 540 (TTAB 1972).

As to applicant's arguments that its mark would be regarded by restaurant and bar patrons as a design or depiction of the word "RAM" and that the registrant's cited mark has no clear meaning due to the absence of an apostrophe in the word "RAMS," we concur with the Examining Attorney that applicant's

⁹ Even if, however, such registration were properly to be given any weight, the mirror image depiction of two rams ready to butt heads, which gives symmetry to the graphical style of the "RAMS HEAD" and design mark and serves to accentuate the subordinate slogan "WHERE GREAT MINDS MEET" therein, is not sufficient to persuade us that the cited registrant and customers would necessarily regard the words "RAMS HEAD" as connoting the words "RAMS' HEAD" rather than "RAM'S HEAD."

mark is a picture or representation of a ram's head and that a permissible or plain meaning for the registrant's cited "RAMS HEAD" mark is "RAM'S HEAD." Clearly, in the case of applicant's mark, because of the distinguishing curved horns and the lack of any body or torso elements other than a portion of a neck, the design of the male bighorn sheep depicted is literally that of a ram's head. As such, it is but a pictorial representation of the cited "RAMS HEAD" mark, notwithstanding the absence of an apostrophe in the cited mark.¹⁰ Applicant, as the Examining Attorney points out in her brief, has repeatedly acknowledged that its design mark is that of a head of a ram, contending in its response to the initial Office action that "the subject mark is clearly a stylized depiction of the silhouette of a ram's head" and that:

The drawing [of the mark] stops at the neck and includes no other features of a ram and no background or other graphic elements. In short, the subject mark is clearly a stylized depiction of the silhouette of a ram's head. It is not a detailed, pictorial drawing meant to depict a ram in a life-like way and would never be viewed that way by consumers.

Nonetheless, while concededly, as applicant now argues on appeal, some customers for its services could regard the readily recognizable head of a ram which constitutes applicant's mark as simply the equivalent of the word "RAM," it is also

¹⁰ For the word "RAMS" in the cited mark to be principally regarded by customers for restaurant and tavern services as "RAMS'" rather than "RAM'S," the cited mark would have to be "RAMS HEADS" instead of "RAMS HEAD." Stated otherwise, since the word "HEAD" in the cited mark is singular instead of plural, the word "RAMS" therein would necessarily be viewed by restaurant and tavern patrons as if it were the singular possessive "RAM'S" rather than the plural possessive "RAMS'."

undeniably the case that many of those customers would immediately perceive applicant's mark as that of a ram's head. Such would especially be the case with respect to those who have also heard of or otherwise are aware of or familiar with the cited "RAMS HEAD" mark. The pictorial depiction of a ram's head in applicant's mark and the words "RAMS HEAD" which comprise the cited mark are thus likely to impress the same mental image on customers for restaurant and bar or tavern services.

Moreover, even if it is arguably the case that visually "the cited mark is a syntactic anomaly, being the conjunction of a plural noun and a singular noun" as urged by applicant, there is no uncertainty in its meaning or connotation when such mark is pronounced. Here, as the Examining Attorney persuasively argues in her brief, "the average purchaser will remember the cited mark RAMS HEAD as 'ram's head' and will not stop to analyze or even remember any grammatical error in the cited mark." In this case, the mark "RAMS HEAD" could only mean or connote the term "RAM'S HEAD," due to the singular form of the word "HEAD" in such mark. Given, furthermore, that restaurant and tavern or bar services are often advertised on the radio or promoted by word of mouth, the absence of an apostrophe in the cited mark is immaterial because the plain meaning of such mark when spoken is "ram's head," which is literally identical to the mental image conveyed by applicant's design mark.

Finally, as to applicant's contention that the cited mark may possibly have significance as a geographical term or place, we concur with the Examining Attorney that the record

contains no evidence in support thereof. Specifically, as the Examining Attorney accurately notes in her brief, applicant not only failed to furnish any evidence of the possibility of any such meaning for the cited "RAMS HEAD" mark, but the Examining Attorney "attached evidence from the [cited] registrant's web site that shows the locations of its taverns" and which further shows that "[n]one are located in a geographical area known as 'Rams Head.'" In addition, as the Examining Attorney points out, the record reveals that her "search of a geographical dictionary found no entry for 'Rams Head' or 'Ram's Head,'" and that "copies from an online version of the Columbia Gazetteer at www.bartleby.com ... show no entry for a geographical location known as RAMS HEAD or RAM'S HEAD."

Accordingly, we conclude that customers and prospective patrons who are familiar or otherwise acquainted with the cited registrant's "RAMS HEAD" mark for restaurant and tavern services would be likely to believe, upon encountering applicant's legally equivalent ram's head design mark for restaurant and bar services, that such services emanate from, or are otherwise sponsored by or affiliated with, the same source.

Decision: The refusal under Section 2(d) is affirmed.